UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR

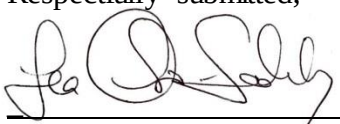
KELLY SERVICES, INC.

and **Case 04-CA-171036**

T JASON NOYE, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN RESPONSE TO RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted,



Dated: July 5, 2017

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I. INTRODUCTION

On May 23, 2017, Chief Administrative Law Judge (ALJ) Robert A. Giannasi correctly found, as alleged in the complaint, that Kelly Services, Inc. (Respondent) violated Section 8(a)(1) of the Act by maintaining a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (Arbitration Agreement) that (1) requires employees to waive their right to maintain class or collective actions in all forums, whether arbitrator or judicial, with respect to their wages, hours or other terms and conditions of employment (ALJD 4:18-22);[1] and (2) restricts employee access to Board processes by prohibiting employees from receiving back pay or other monetary compensation through Board proceedings (ALJD 5:34-36).

Respondent's Arbitration Agreement fall squarely within the ambit of the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014),), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017) and *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.2d 344 (5th Cir. 2013), which prohibit employers from imposing policies or agreements that preclude employees from pursuing employment related collective claims as a condition of employment and from restricting employees' access to Board processes. Respondent's Arbitration Agreement also falls squarely within the ambit of the Board's decision in *U-Haul Co. of California*, 347 NLRB 375, 377-378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), which made clear that mandatory arbitration policies that interfere with employees' right to file an unfair labor practice charge or otherwise restrict employee access to the Board's processes are unlawful. As the ALJ correctly decided the issues, Respondent's exceptions should be overruled.

[1] Throughout this Brief, ALJD refers to the ALJ's decision, followed by page and line numbers; SOF refers to the Stipulation of Facts, followed by the ¶ number; JX refers to the Joint Exhibits followed by the exhibit number.

II. PROCEDURAL HISTORY

On March 4, 2016, Charging Party T Jason Noye, filed a charge in Case 04-CA-171036 alleging that Respondent violated Section 8(a)(1) by maintaining an unlawful mandatory arbitration agreement. (JX-1) On July 14, 2016, the Charging Party amended the charge to add an allegation that Respondent's maintenance of unlawful arbitration agreements also restricts the remedies available in charges filed with the National Labor Relations Board. (JX-2) On December 28, 2016, the Regional Director of Region 4 issued a Complaint and Notice of Hearing alleging that Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful arbitration agreement. (JX-3) On January 11 and 12, 2017 respectively, Respondent filed its Answer to the Complaint and Amended Answer to the Complaint. (JX-4; JX-5) Because the facts in this case are not in dispute, the parties filed a Joint Motion and Stipulation of Facts. In the Joint Motion, the Parties agreed that the record in this case shall consist of the joint stipulation of facts, including all exhibits attached thereto. On March 31, 2017, the ALJ issued an Order Accepting Stipulation and Setting Briefing Dates. On May 23, 2017, the ALJ issued The ALJ issued his decision. This Answering brief is filed in response to Respondent's Exceptions to the Decision of the Administrative Law Judge.

III. STATEMENT OF THE FACTS

Respondent is a corporate entity with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, engaged in providing temporary staffing to employers. (SOF ¶1). Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained the Arbitration Agreement as a condition of employment for all employees. (SOF ¶4; JX-6). The Arbitration Agreement includes, inter alia, the following provisions:

1. Agreement to Arbitrate. Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration, instead of going to court, for any "Covered Claims" that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.

2. Claims Subject to Agreement. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

> 16. **Savings Clause & Conformity Clause**. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

IV. ARGUMENT

A. The ALJ properly found that Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment. (Exception 1)

Respondent's Exception 1 attacks the Board's decision in *Murphy Oil*. As it is clear that Respondent's Arbitration Agreement violates Section 8(a)(1) under *Murphy Oil*, Respondent challenges *Murphy Oil* itself. Respondent is correct in noting that the issue is presently before the United States Supreme Court, but fails to present any facts or argument that can support overturning the ALJ's finding at the present time.[2]

The Board's *Murphy Oil* decision firmly established that collective action in arbitration, like the collective pursuit of workplace grievances through litigation, is protected by Section 7 of the Act. *Murphy Oil*, slip op. at 6-7; See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

[2] Although the Supreme Court has granted certiorari in, and consolidated cases, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), cert. granted; *Lewis v. Epic Systems Corp*., 823 F.3d 1147 (7th Cir. 2016), cert. granted; and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), cert. granted, the Court will not hear the case until the October 2017 term. Respondent asserts that the Board should hold this case in abeyance until the Supreme Court rules on the issues presented in *D.R. Horton* and *Murphy Oil*, matter, ignoring that the second allegation of this proceeding would not be resolved by the Court's decision. Thus, this proceeding would ultimately have to be resolved by the Board in any event. Moreover, Respondent ignores the fact that it was offered the opportunity to settle the *Murphy Oil* allegation conditionally and to proceed solely on the second allegation but chose not to.

Since then, the Board has repeatedly and consistently held that agreements that require employees, as a condition of employment, to refrain from bringing collective action in any forum, either judicial and arbitral, unlawfully restrict employees' Section 7 rights. See *Bristol Farms*, 364 NLRB No. 34 (2016) (mandatory arbitration agreement which as applied precluded collective action in all forums was unlawful); *Adecco USA, Inc.*, 364 NLRB No. 9 (2016) (class waiver arbitration agreement barring the charging party from filing a private attorney general act cause of action was unlawful); *ISS Facility Services, Inc*., 363 NLRB No. 160, slip op. at 2 (2016) (maintenance of class waiver arbitration agreement unlawful); *Kenai Drilling Limited*, 363 NLRB No. 158 (2016) (maintenance and enforcement of class waiver arbitration agreement unlawful); *RPM Pizza, LLC*, 363 NLRB No. 82 (2015) (same).

As the ALJ correctly noted, the Board's holdings in *D.R. Horton, Murphy Oil* and their progeny remain Board law unless and until that position is reversed by the Supreme Court. (ALJD 4, fn. 2) See, e.g., *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004). In *Pathmark Stores*, the Board reiterated that:

> [i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise … [I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

342 NLRB 378, n. 1 (2004) (emphasis added), quoting *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964), quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957). See also, *Citigroup Technology, Inc.*, 363 NLRB No. 55, slip op. at 6 (2015); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

As set forth above in the statement of facts, and as correctly found by the ALJ, Respondent requires its employees to sign the Arbitration Agreement as a condition of employment that limits the resolution of all "Covered Claims,"—essentially any employment-related disputes—to arbitration and expressly restricts employees from participating in "any class, collective, or representative proceeding." (ALJD 4:18-22; JX-6) Even if this language was not considered an explicit prohibition on Section 7 activities, employees would reasonably construe it in that manner given the broad prohibitive language of the Arbitration Agreement. *Murphy Oil*, 361 NLRB No. 72, slip op. at 26, citing *Lutheran Heritage Village,* 343 NLRB 646, 647 (2004). By requiring employees to sign the Arbitration Agreement as a condition of employment, Respondent has attempted to foreclose all concerted employment-related litigation or arbitration by employees and effectively stripped employees of their Section 7 right to engage in this form of concerted activity for their mutual aid and protection. See e.g. *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 2 (2015). Even if Respondent's Arbitration Agreement was not a condition of employment, it would still be unlawful. *Bristol Farms*, supra, 364 NLRB No. 34, slip op at 1, fn. 3; *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

Based on the above, the ALJ correctly found that Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment. Accordingly, it is urged that the Board affirm the ALJ's findings and find a Section 8(a)(1) violation.

B. The ALJ correctly found that Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings. (Exception 2)

Respondent's Exception 2 argues that the ALJ: (1) wrongly concluded that there was an ambiguity in the language of the Arbitration Agreement that compels a violation as the Arbitration Agreement that explicitly allows for the filing of Board charges; and (2) disregarded the stipulated issue in determining that Board remedies are part of the Board's processes. Contrary to Respondent, the ALJ properly found that the Arbitration Agreement interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings. (ALD 4:10-18) Furthermore, the ALJ did not disregard the stipulated issues as the ALJ properly found that that Board remedies are part of the Board's processes. (ALJD 5-6)

1. *The ALJ properly found that the Arbitration Agreement interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.*

The Board has long recognized that "filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7." *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 4 (2016) quoting *Mesker Door, Inc.,* 357 NLRB 591, 596 (2011). Moreover, the right to file Board is meaningless unless it entails "the right to have the Board exercise its statutory powers under Section 10 of the Act: i.e., to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures." *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 3 (2016). Thus, employees' "complete freedom" to access to the Board's processes is a fundamental purpose of the Act and must be vigorously safeguarded. *NLRB v. Scrivener*, 405 U.S.

117, 122 (1972) (citations omitted); see also *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 4 (2016); *SolarCity*, 363 NLRB No. 83, slip op. at 4.

Recognizing that preserving access to the Board is "a fundamental goal of the Act," the Board must "carefully examine employer rules that interfere with this goal." *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2, citing *SolarCity Corp.*, supra. Thus, the Board has repeatedly held that mandatory arbitration policies that interfere with employees' rights to file unfair labor practice charges are unlawful. See *Dish Network, LLC,* 365 NLRB No. 47, slip op. at 2 (2017); *U-Haul Co. of California*, supra, 347 NLRB at 377–378; *Acuity Specialty Products, Inc*., 363 NLRB No. 192 (2016); *SolarCity Corp.*, supra, slip op. at 5-6; *Bill's Electric, Inc*., 350 NLRB 292, 296 (2007).

The proper test for determining whether employees would reasonably believe that a mandatory arbitration policy interferes with their ability to file a Board charge or otherwise access the Board's processes is that set forth in *Lutheran Heritage Village-Livonia,* supra. See *U-Haul Company of California*, supra. See also, e.g., *Dish Network, LLC,* supra; *SolarCity Corp.*, supra, slip op. at 5. Under that test, a policy such as Respondent's violates Section 8(a)(1) if it expressly restricts Section 7 activity or, alternatively, when (1) employees would reasonably read it as restricting such activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, supra.

Even where mandatory arbitration agreements contain a "savings clause" with explicit exclusions of claims under the Act, the Board has held that the "savings clause" language must be read in context of the complete agreement or policy to determine, under the *Lutheran Heritage* test, whether employees would reasonably believe that the policy interferes with their ability to

access the Board processes. See, e.g., *SolarCity Corp.*, supra; *Hooters of Ontario Mills*, 363 NLRB No. 2, slip op. at 1-2 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 1-3 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 fn. 4 (2015). Further, the Board "recognize[s] that 'rank-and-file employees … cannot be expected to have the same expertise [as lawyers] to examine company rules from a legal standpoint.'" *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2 quoting *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 1. Thus, the Board has long held that "employees should not have to decide at their own peril" whether an ambiguous employment rule bans protected conduct. *Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), enfd. in relevant part, 805 F.3d 309 (D.C. Cir. 2015). Therefore, any ambiguity in the rule, which could lead employees to draw from it a coercive meaning, must be construed against the employer. See *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), enfd, 746 F.3d 205 (5th Cir. 2014); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd mem., 203 F.3d 52 (D.C. Cir. 1999). The mere maintenance of an unlawful rule, even absent enforcement, constitutes an unfair labor practice. *Lutheran Heritage Village-Livonia*, supra at 649; *Lafayette Park Hotel*, supra at 825.

As correctly found by the ALJ, despite language allowing for the filing of Board charges, the Arbitration Agreement is ambiguous when read as a whole. (ALJD 5:13-14) The Covered Claims in the Arbitration Agreement encompasses "all common-law and statutory claims relating to … employment," including claims for unpaid wages, wrongful termination, discrimination, harassment, and retaliation normally reserved for the Board. This very broad language is then followed by the statement, in bold, "that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims." (JX-6,

¶ 2) This language would reasonably lead employees to believe that any claim related to their termination, wages, compensation, work hours or any other employment dispute covered under the Act, a federal statute, must be submitted to Respondent's arbitration procedures. The third paragraph, the "Exclusions from Agreement" clause, while excluding certain types of claims such as unemployment and workers compensation claims does not explicitly mention unfair labor practice claims. Further, it is only at the end of this Exclusion clause that there is any mention of allowing for the filing of administrative charges with the Board and, as described further below, that right is circumscribed. (JX-6, ¶ 3) The Exclusion clause is followed later in the agreement with the clause waiving class and collective claims. (JX-6, ¶ 8) An employee especially one without "specialized legal knowledge" would be unable to determine from this language, whether and to what extent the Arbitration Agreement's exception for filing charges with the Board modifies the broad prohibition on pursuing any form of collective or representative activity, particularly since the "Exclusions clause" does not clarify that such charges may be filed on an individual or collective basis. This ambiguity would lead a reasonable employee to question whether he may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees. *See Securitas Security Services USA, Inc.*, supra, slip op. at 4; *SolarCity Corporation*, supra, slip op. at 6-8; *ISS Facility Services, Inc.*, supra, 363 NLRB No. 160, slip op at 3. The ambiguity of the Arbitration Agreement must be construed against Respondent as the Arbitration Agreement's drafter. *Lafayette Park Hotel*, 326 NLRB at 828.

Moreover, the ALJ correctly found that "the Arbitration Agreement's token recognition of the right to file Board charges is 'illusory'… [a]nd the overall Agreement can reasonably be read to inhibit the filing of Board charges." (ALJD 5:15-17) As Respondent must acknowledge,

the Exclusion Clause does not simply allow for the filing of Board charges under the Arbitration Agreement; Respondent added a requirement that employees must waive their rights to any "monetary recovery" for administrative claims filed with state or federal government or with administrative agencies, including the Board, regardless of who filed those claims, unless they seek such monetary recovery through arbitration. (JX-6, ¶ 3) The ALJ correctly found that "a reasonable reading of the Arbitration Agreement's prohibition against monetary remedies from the Board is an added inhibition against the filing of [Board] charges." (ALJD 5:31-33) Yet, according to Respondent, this waiver does not affect employees' access to the Board's processes because employees may still file charges with the Board. Contrary to Respondent, a reasonable employee reading the Arbitration Agreement would believe that it is futile to file a charge with the Board because if the employee was successful before the Board, the employee would nonetheless not be entitled to backpay or other monetary relief through the Board's remedies and would be required to seek arbitration to obtain the remedy that the employee would be entitled to pursuant to the Board's order. *Professional Janitorial Service of Houston*, 363 NLRB No. 35 slip op at 3 (2016). See also *Bill's Electric*, 350 NLRB at 296 (Board finding arbitration and grievance agreement would reasonably be read by employees "as substantially restricting, if not totally prohibiting, their access to the Board's processes"). The provision ensures that even if someone other than an employee, such as another employee, a labor organization, or any other individual or organization, pursues a Board charge, the remedy for the Board charge would be gutted, as an employee subject to the Arbitration Agreement policy would not be entitled to any monetary remedy for that action unless through arbitration. Thus, it is clear that Respondent's Arbitration Agreement plainly interferes with the Board's processes.

2. *The ALJ did not disregard the stipulated issue and properly found Respondent's defenses to be without merit.*

The ALJ correctly dismissed Respondent's arguments defending the lawfulness of the Arbitration Agreement. (ALJD 5:38-48, 6:1-16) As recognized by the ALJ, Respondent's arguments are contrary to current Board law as espoused in *Ralph's Grocery*, supra. (ALJD 5:38-40). Even assuming that mandatory arbitration agreements, which contain language, however buried and ambiguous, that employees may file charges with the Board are lawful, under the rationale espoused by Chairman Miscimarra in *Ralph's Grocery*, Respondent's arguments still fail. Unlike *Ralph's Grocery* and other cases in which Chairman Miscimarra found mandatory arbitration agreements to allow access to the Board's processes, the Arbitration Agreement here does not. It only provides limited access.

Respondent excepted to the ALJ's finding that the Arbitration Agreement was unlawful arguing that the ALJ disregarded the stipulated issue because it "requires a finding that the Agreement "interferes with and restricts employee access to Board processes by prohibiting Respondent's employees from receiving back pay or other monetary compensation through Board proceedings." Respondent disingenuously argues that as the Arbitration Agreement allows employees to file charges with the Board, it is inconsequential that the employee cannot obtain monetary relief through the Board because the Board's processes do not include the Board's remedial authority. Contrary to Respondent, the ALJ did not ignore the stipulated issue. As the ALJ correctly found, remedies are part of the Board's processes. (ALJD 6:1-11) Section 10(c) of the Act provides for reinstatement and backpay, among other remedies, in order to remedy unfair labor practice charges. As the ALJ correctly noted, "[i]t is difficult to envision how, once the Board's processes have been invoked, the Arbitration Agreement could preclude the Board from exercising its full statutory powers, including its remedial authority."

(ALJD 5:23-26) The enforcement of the Act is a public, not individual, concern. As the Supreme Court recognized in *National Licorice Co., v. NLRB*, 309 U.S. 350, 364 (1940), "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act." As it has long been recognized by the Board:

> The remedy of reinstatement and backpay is not a private right, but a public right granted to vindicate the law against one who has broken it. Its object is to discourage discharges of employees contrary to the statute and thereby vindicate the policies of the National Labor Relations Act. The statute authorizes reparation orders, not in the interest of the employees, but in the interest of the public. They are not private rewards operating by way of penalty or of damages.

Clayton-Willard Sales, 126 NLRB 1325, 1326-27 (1960). Thus, the remedies for unfair labor practices are not separate from but are part and parcel of the Board's processes. Denying monetary remedies for successful Board charges, as the Arbitration Agreement does, clearly results in "substantially restricting, if not totally prohibiting, [employees'] access to the Board's processes." *Bill's Electric*, 350 NLRB at 296. Thus Respondent's Exception 2(b) is without merit.

The ALJ also correctly concluded that Respondent's convoluted argument—that the General Counsel has somehow made an arbitrary distinction between cases where a monetary remedy might be applicable and cases where it would not for determining lawfulness of the Arbitration Agreement—is not only unpersuasive but also baseless. (ALJD 5:40-42) The Arbitration Agreement is meant to take care of claims that relate to employee's employment—"including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment,

and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status." (JX-6, ¶ 2) These are the kinds of claims that if successful, there is a likelihood of monetary relief. These also include the types of cases that would result in backpay remedy if an employee was successful in a Board proceeding. Respondent knows this. While there is no doubt that not all unfair labor practice charges have merit and that not every charging party will be entitled to backpay or monetary relief, and no one argues otherwise, whether a particular charge seeks back pay is irrelevant to the analysis of whether a charge interferes with Board processes. The end result of requiring charging parties to arbitrate any monetary relief they are entitled to under the Board's remedial processes is just another obstacle to put before employees for exercising their Section 7 rights. This is the point of the Arbitration Agreement. The likelihood then is that in these circumstances a reasonable employee considering whether to file a charge with the Board concerning his or her employment would believe it would be futile to do so and would end up not filing a charge. There is no doubt that Respondent's Arbitration Agreement is exactly the type of mandatory arbitration agreement that interferes with employees' ability to access the Board processes.

The ALJ also correctly found that under current Board law, "deferral to arbitration is a discretionary policy of the Board that has been used only when the arbitration provision has been the result of a collectively bargained agreement, which is not the case here." (ALJD 6:13-16) citing *Ralph's Grocery*, 363 NLRB No. 128, slip op. at 3. As acknowledged by Respondent, deferral is discretionary by the Board. See *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 3–4 (2014). Respondent also acknowledges that current Board law only finds deferral appropriate in situations where a collective bargaining agreement between a union and an employer provides for arbitration. *Ralph's Grocery*, slip op. at 3. Respondent argues that

because the Board defers to arbitration when the arbitration has been the result of a collectively bargained agreement, the same policy reasons apply and the Board should defer to arbitration in an individual agreement as well. This argument is mistaken.[3] Respondent misconstrues the meaning of Section 10(a); incorrectly suggesting that its provision for the adjudication of claims outside of the Board's processes deprives the Board of its jurisdiction over unfair labor practices charges. However, Section 10(a) was meant as a means of making clear that the Board's authority is not limited by the adjudication of statutory claims outside of the Board's processes. As such, the Board "is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award." *Babcock & Wilcox Construction Co.*, supra, slip op at 3 citing *International Harvester Co.*, 138 NLRB 923, 925–926 (1962), enfd. 327 F.2d 784 (7th Cir.1964), cert. denied 377 U.S. 1003 (1964). Moreover, even where the Board defers to arbitration, it reserves the right to review the arbitral decision to ensure that employees' Section 7 rights are protected. *Babcock & Wilcox Construction Co.*, slip op. at 4-6. Here, however, Respondent is seeking to ***require*** individual employees to arbitrate unfair labor practice claims that would otherwise be resolved by the Board under the Act's procedures, without recourse or review by the Board. This is contrary to the policies of the Act, which seek complete freedom for employees to participate in the Board's processes. Such a requirement "necessarily interferes with employees' statutory right of access to the Board." *Ralph's Grocery*, supra, slip op. at 3. Thus, the ALJ correctly dismissed this defense. Accordingly, Respondent's argument has no merit and must be rejected.

Respondent's final argument concerning non-Board settlements is also without merit.

[3] Respondent's reliance on *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 257 (2009) is misplaced. See *Babcock & Wilcox Construction Co*., slip op. at 5 fn. 8 ("Because of the discretionary character of the Board's deferral to arbitration, the Supreme Court's decisions in such cases as *14 Penn Plaza LLC v. Pyett*, 556 U. S. 247 (2009)... are not controlling here. ").

Respondent confuses the Board's approval of settlements, both Board and non-Board, with the arbitration required here. Contrary to Respondent's characterization of non-Board settlements, the Board has made it clear that it will reject settlements that are repugnant to the Act or Board policy. *Independent Stave Co.*, 287 NLRB 740, 741 (1987). Furthermore, the Agency recognizes that individual charging parties may unwittingly enter into non-Board settlements that are repugnant to the Act. This concern is reflected in Agency policy. Section 10142 of the Case Handling Manual states: "In those situations where alleged discriminatees are not represented by counsel, caution should be exercised to ensure that the non-Board settlement is not repugnant to the purposes of the Act or that advantage has not been taken of an individual in private negotiations." Thus, in a non-Board settlement, the parties negotiate to reach a mutually satisfactory resolution of the unfair labor practice charge within the parameters set by the Board and Agency Policy, including backpay .[4] Arbitration, however, is not negotiation.[5] Under the Arbitration Agreement, an employee would have the burden of proving to an arbitrator that he or she is entitled to a monetary settlement as well as the amount. Furthermore, unlike the situation in the Arbitration Agreement, individual charging parties are not compelled or required to enter into a non-Board settlement, but can insist on a Board settlement. And, obviously, if there is no settlement, the Board can order that the individual be made whole, including backpay, benefits and search-for-work and interim employment expenses—a make whole remedy unlikely to be instituted by an arbitrator. Thus, under the Arbitration Agreement, the remedy for a Board charge would be gutted, without review and even if repugnant to the Act. Accordingly, Respondent's argument has no merit and must be rejected.

[4] Respondent's argument that backpay amounts in settlements may not always be 100 percent misses the point that Board and Agency policy seeks to make discriminatees whole and thus requires review when a settlement does not.

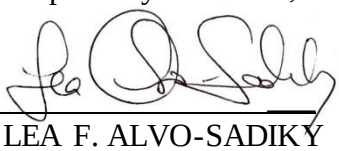
[5] Nor is the Arbitration Agreement here reached through negotiation, as it is a condition of employment. See *Ralph's Grocery*, supra.

Based on the above, the ALJ correctly found that the Arbitration Agreement would reasonably be read by employees to restrict their statutory right of access to the Board. By maintaining the Arbitration Agreement, Respondent has interfered with employees' Section 7 right to file charges with the Board and avail themselves of the Board's processes in violation of Section 8(a)(1) of the Act.

V. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests that the Board reject Respondent's exceptions. The clear preponderance of all the relevant evidence demonstrates that the ALJ's findings of fact, conclusions of law, remedy and order were fully supported by the record evidence and established Board law.

Respectfully submitted,



Dated: July 5, 2017

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